CLERK OF THE SUPREME COURT

STATE OF MISSOURI

Jefferson City, Missouri

November 12, 1958

Mr. Ernest W. Rothfelder
1012 Corby Building
St. Joseph, Missouri

Dear Sir:

This is to advise that the Court made the following order on November 10, 1958:

"In re: Ernest Willis Rothfelder—Application for license under Rule 8.09 denied."

Yours very truly,

Marion Spicer,
Clerk.

December 12, 1958.

Mr. John W. Oliver, Attorney
1000 Federal Reserve Bank Building
Kansas City 6, Missouri

Dear Mr. Oliver:

I was admitted to practice in the State of Kansas June, 1953 and thereafter have maintained, and do at this time, an office within the State. Last summer I applied for admission to the Missouri Bar under Rule 8.09. I received a letter from Mr. Spicer, Clerk of the Supreme Court, dated November 12, 1958, as follows:

"In re: Ernest Willis Rothfelder--Application for license under Rule 8.09 denied."

Naturally, I was very much surprised to learn that my application had been denied, and am at a loss to know upon what grounds such a decision was based. I think it is only proper that I be furnished a Bill of Particulars by your Board, setting forth the reasons my application was denied.

While I do not find any Supreme Court rules applicable to my situation, I respectfully request that you furnish me with a Bill of Particulars and that I have the opportunity of appearing before your Board for a hearing.

Very sincerely yours,

EWR:lt

STATE BOARD OF LAW EXAMINERS
STATE OF MISSOURI

Robert E. Seiler, Secretary
First National Building
Joplin, Missouri

December 18, 1958

Mr. Ernest W. Rothfelder
Law Offices Over The Theatre
Highland, Kansas

Dear Mr. Rothfelder:

This will acknowledge receipt of your letter of December 12th which arrived during my absence from the city.

Copies of your letter are today being forwarded to the other members of the Board and as soon as a decision is reached you will be advised.

Yours very truly,

John W. Oliver.

JWO:er

cc: All Members of the Board

CLERK OF THE SUPREME COURT

STATE OF MISSOURI

Jefferson City, Missouri

January 16, 1959

Mr. Ernest W. Rothfelder
1012 Corby Building
St. Joseph, Missouri

Dear Sir:

The Court is advised that you desire to know the grounds upon which your application for license to practice law in this state was denied. I am directed by the Court to advise you that it was denied upon the ground you had not engaged in the practice of law for five years in the State of Kansas as required by Supreme Court Rule 8.09.

Yours very truly,

Marion Spicer
Clerk

February 23, 1959

Mr. John W. Oliver, Attorney
1000 Federal Reserve Bank Bldg.
Kansas City 6, Missouri

Dear Mr. Oliver:

During the first week of December, I was in your office and talked with you concerning my application for admission to the Missouri Bar which had been denied. As I recall you suggested a letter from me requesting a hearing and a Bill of Particulars as to why my application had been denied.

This letter was sent and on January 16, 1959 a letter from Marion Spicer was received stating—

> "I am directed by the Court to advise you that it was denied upon the ground you had not engaged in the practice of law for five years in the State of Kansas as required by Supreme Court Rule 8.09."

As of this date I have not received any information relative to my opportunity to appear before the Board of Examiners in open hearing. As I recall, in our conversation early in December, you felt I would be accorded the opportunity, but not before the Bar examination was given in February at which time all members would be together.

I have taken the liberty of enclosing affidavits which have been secured to substantiate my contention that I was engaged in the practice of law in the State of Kansas five years previous to my application to the Supreme Court of Missouri.

Since it is getting close to examination time, and I have not heard from the Board, naturally I am becoming quite apprehensive, so could you tell me if I will be en-

titled to a hearing when the Board meets for the law examination and when this will be.

Yours very truly

EWR:lt
enc

STATE BOARD OF LAW EXAMINERS

STATE OF MISSOURI

February 24, 1959

Mr. Ernest W. Rothfelder
1012-15 Corby Building
St. Joseph, Missouri

Dear Mr. Rothfelder:

Your letter of February 23, 1959, directed to Mr. John W. Oliver at Jefferson City, Missouri, was handed to me for reply as I am presently acting as president of the board of law examiners.

Since the matter presented in your letter is now within the jurisdiction of the Supreme Court of Missouri, neither I nor any member of the board can further correspond with you about the same.

I am returning the affidavits which were enclosed with your letter herewith.

Yours very truly,
David Donnelly
President

cc -
Mr. Croft
Mr. Oliver
Mr. Seiler
Mr. Wright

CLERK OF THE SUPREME COURT

STATE OF MISSOURI

Jefferson City, Missouri

April 16, 1959

Mr. Ernest W. Rothfelder
1012-15 Corby Building
St. Joseph, Missouri

Dear Sir:

I wish to advise that the Court made the following order on April 13, 1959:

"In re: Ernest Willie Rothfelder. Motion for rehearing on application for license denied."

Yours very truly,

Marion Spicer
Clerk

ERNEST W. ROTHFELDER
Attorney at Law
Highland, Kansas

April 21, 1959

Robert E. Seiler, Secretary
State Board of Law Examiners
First National Building
Joplin, Missouri

Dear Mr. Seiler:

I just received word on Saturday April 18, 1959, that the motion for a rehearing on my application for admission by reciprocity had been denied, therefore I would like to take the next Bar examination, but it will be impossible for

me to fulfill the new three months resident requirement prior to the examination.

Will you please bring before the Board the question of waiving this requirement under Supreme Court Rule 8.03 (d) which reads "And received the approval of the Board of Law Examiners as provided in sub-section 8.07. Provided, however, the Board of Law Examiners, is vested with authority to fix and to waive the time for the filing of applications and to waive length of residence requirements mentioned in sub-section 8.05, as particular circumstances justify and where not harmful to the standards for admission to the bar."

Very truly yours,

Ernest W. Rothfelder

EWR/ez

STATE BOARD OF LAW EXAMINERS

STATE OF MISSOURI

Robert E. Seiler, Secretary
First National Building
Joplin, Missouri

April 27, 1959

Mr. Ernest W. Rothfelder
1012-15 Corby Building
St. Joseph, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 21st, which we have handed to the clerk of the court with the request that he send you the necessary forms.

Upon completion of said forms the board will be glad to consider further the request which you make in your letter.

Yours very truly,

Robert E. Seiler
Secretary

STATE BOARD OF LAW EXAMINERS

STATE OF MISSOURI

Robert E. Seiler, Secretary
First National Building
Joplin, Missouri

May 13, 1959

Mr. Ernest W. Rothfelder
1012-15 Corby Building
St. Joseph, Missouri

Re: No. 17822—Application to Take Missouri Bar Examination

Dear Sir:

As Secretary of the Board of Law Examiners, I have gone over your file in connection with your application to take the bar examination.

The Board is willing to waive the requirement as to the time for the filing of the application, but there is nothing we can do about waiving the requirement that you must be a bona fide resident of Missouri in order to take the Missouri bar examination.

Your application shows that you are a resident of Kansas, living at Highland, Kansas, and that your intentions

about Missouri are, as you put it, "Moving to St. Joseph, Missouri, if".

Your application shows on its face that you are not eligible to take the Missouri bar examination and the application is not approved.

This is not to say that your application is sufficient in all the other respects. We do not pass upon any of the other requirements because there is no need to do so in view of the failure to meet the residence requirement.

Yours very truly,

Robert E. Seiler
Secretary

RES:mt
cc: Honorable Marion Spicer
All Members of the Board

July 21, 1959

Mr. Marion Spicer, Clerk
Supreme Court
State of Missouri
Jefferson City, Missouri

Re: Ernest W. Rothfelder

Dear Sir:

As you know, the Supreme Court of the United States has granted additional time for the above petitioner to file his Writ of Certiorari. The reason relied on by petitioner for an extension of time was the failure of the transcript of the above record to reflect the reasons for his nonadmission to the Bar of the State of Missouri, as set out in your letter of January 16, 1959 directed to Mr. Rothfelder.

We would greatly appreciate your prompt advice as to whether or not you desire to send us a supplemental transcript containing the information of your January 16th letter, or if you desire to permit the transcript to stand as received by Mr. Rothfelder.

You can readily appreciate the need for dispatch in this matter, as Mr. Rothfelder has only been granted additional time until August 12, 1959.

Very truly yours,

DOWNS & PIERCE
John E. Downs

JED/rbw
CC—John M. Dalton

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Jefferson City, Missouri
July 22, 1959

Mr. John E. Downs
509-10 Corby Building
St. Joseph, Missouri

In re: Ernest W. Rothfelder

Dear Sir:

In reply to your letter of July 21, 1959 I wish to advise that I cannot send you a supplemental transcript for the reason that all of the record entries were included in the transcript previously furnished.

Yours very truly,

Marion Spicer
Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 7 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 398.

ERNEST WILLIS ROTHFELDER,
Petitioner,
vs.
SUPREME COURT OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF RESPONDENT IN OPPOSITION.

COBURN, CROFT & COOK,
RICHMOND C. COBURN,
401 North Seventh Street,
St. Louis 1, Missouri,
Counsel for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CHestnut 1-2377.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 303.

ERNEST WILLIS ROTHFELDER,
Petitioner,

vs.

SUPREME COURT OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

There have been no opinions rendered by any Court below.

JURISDICTION.

The judgment of the Supreme Court of Missouri was entered on November 10, 1958. A motion for rehearing was denied on April 13, 1959. On July 13, 1959, Justice

Clark extended the time for filing a petition for writ of certiorari to and including August 12, 1959. The jurisdiction of this Court is invoked under 28 U. S. 1257 (3).

QUESTIONS PRESENTED.

1. Whether this Court has jurisdiction to decide Federal questions not raised by petitioner in any of the proceedings below.

2. Whether a State Court decision denying a motion for rehearing which is 100 days out of time rests on an adequate non-federal ground.

3. Whether petitioner has a constitutional right to be admitted to practice law in Missouri without taking a bar examination.

STATUTES AND RULES INVOLVED.

The following statutes and rules are involved:

(1) Section 1257 (3), 28 U. S. C.; (2) Supreme Court Rule 1.19, Vernon's Annotated Missouri Statutes; (3) Supreme Court Rule 8.05, Vernon's Annotated Missouri Statutes, February, 1959, Cumulative Pamphlet; (4) Supreme Court Rule 8.07, Vernon's Annotated Missouri Statutes, February, 1959, Cumulative Pamphlet; (5) Supreme Court Rule 8.09, Vernon's Annotated Missouri Statutes.

These provisions may be found in the Appendix attached to this brief.

STATEMENT.

On July 18, 1959, petitioner applied for admission to the Bar of Missouri under the reciprocity provisions of Missouri Supreme Court Rule 8.09 which provided that "[i]n the discretion of the Court" an attorney who has engaged in the practice of law in another state for five years and who has met a number of other requirements may be admitted to practice law in the State of Missouri without examination.

On November 10, 1958, the Supreme Court of Missouri entered an order denying petitioner's application without opinion. Petitioner was duly notified of this order on November 12, 1958. On December 12, 1958, or about a month later, petitioner wrote to the Missouri Board of Law Examiners asking that he be furnished with a bill of particulars setting forth the reason his application was denied and asking also for a hearing. On January 16, 1959, he was sent a letter by the Clerk of the Supreme Court of Missouri stating that his application was denied upon the ground that he had not engaged in the practice of law for five years in the State of Kansas as required by Supreme Court Rule 8.09. On February 23, 1959, over a month after the letter to petitioner from the Clerk of the Missouri Supreme Court, petitioner wrote the Board of Law Examiners requesting a hearing on his application. The next day, February 24, 1959, the Board of Law Examiners replied that the Board no longer had jurisdiction over petitioner's application because the case had long since been submitted to the Supreme Court of Missouri. (See Petition, Appendix, pp. A1-A5.) On March 6, 1959, petitioner filed a paper styled "Motion for Rehearing on Application for License to Practice Law" with the Supreme Court of Missouri, and on April 13, 1959, this motion

was denied without opinion. It is from this order that petitioner now seeks a writ of certiorari. (See Petition, pp. 2, 3, 6.)

Thereafter, petitioner, applied for permission to take the Missouri Bar Examination. In his application, he stated that he was a resident of Highland, Kansas, and said that he was "[m]oving to St. Joseph, Missouri, if." (See Petition, Appendix, pp. A8, A9.) His application to take the bar examination was denied on May 13, 1959, for the reason that he did not meet the requirement of Rule 8.05, which was in effect at the time of petitioner's application, that petitioner be a "bona fide resident" of Missouri before he can take the bar examination. The Board stated in its letter to petitioner that it was willing to waive the requirement as to the time for filing of the application, but that it could not waive the residency requirement which petitioner admitted he did not meet. (See Petition, Appendix, pp. A6-A9.)

ARGUMENT.

I.

Petitioner Did Not Raise Any Federal Questions in the Proceedings Below and Therefore This Court Lacks Jurisdiction to Decide the Federal Questions Raised for the First Time Here.

Section 1257 (3) of 28 U. S. C., upon which petitioner depends for jurisdiction in this case, provides that a federal issue must be "drawn in question" or "specially set up or claimed" in the state court. Here that was not done. At no time in any of the proceedings below did petitioner raise any federal question of any kind. Petitioner did not suggest to the Board of Law Examiners that if he were not granted a hearing before the Board on his application to be admitted to practice law in the State of Missouri under its reciprocity rules he would be denied due process of law. No such suggestion was made to the Supreme Court of Missouri. Although petitioner had the opportunity to challenge the constitutionality of the Missouri Supreme Court Rules throughout the proceedings below, never once was such a challenge made.

At the very latest, in petitioner's motion for rehearing filed with the Supreme Court of Missouri, he could have challenged on federal constitutional grounds the ruling of the Supreme Court previously entered denying his application for admission to practice law by reciprocity. But petitioner did not do so. "For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question." **Oxley Stave Company v. Butler County,** 166

U. S. 648, 653 (1897). The first mention of any due process clause, federal or state, was made in the petition for writ of certiorari. Since the petitioner did not raise any federal questions below, this Court lacks jurisdiction to decide the federal questions raised for the first time here. **Oxley Stave Company v. Butler County,** supra; **Puget Sound Company v. King County,** 264 U. S. 22, 25 (1924); **McGoldrick v. Compagnie Generale,** 309 U. S. 430, 434 (1940). See **Whitney v. California,** 269 U. S. 530, 538; 274 U. S. 357, 360 (1927).

II.

Even Assuming Petitioner Raised the Federal Questions at Every Opportunity in the Proceedings Below, Still the Decision of the Supreme Court of Missouri Rests on an Adequate Non-Federal Ground.

By petitioner's own admission (Petition, pp. 2, 3, 6), he is here seeking review of the judgment of the Supreme Court of Missouri denying his self-styled "Motion for Rehearing." But that motion was filed out of time. The decision of the Supreme Court denying petitioner's original application for admission to practice law by reciprocity was rendered on November 10, 1958. Under Missouri law, a motion for rehearing must be filed within 15 days after the decision of the Court. (See Missouri Supreme Court Rule 1.19, Vernon's Annotated Missouri Statutes.) Here, petitioner's motion for rehearing was not filed until March 6, 1959, or 116 days after the Missouri Supreme Court's decision. Thus, the judgment denying petitioner's motion for rehearing, which is the judgment that petitioner is seeking to have reviewed here, rested on the adequate non-federal ground that the motion was out of time. It is a settled rule of this Court that where a state court delivers no opinion and it appears that the judgment may have

rested upon a non-federal ground, this Court will not take jurisdiction. **Klinger v. Missouri**, 13 Wall. 257 (1871); **White v. Ragen**, 324 U. S. 760 (1945); **McGoldrick v. Gulf Oil Company**, 309 U. S. 2 (1939). "[W]here it does not appear on which of two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case." **Klinger v. Missouri**, supra, at 263.

III.

The Decision Below Presents No Important Issue of Federal Law and Is Clearly Correct.

There is no important federal issue involved in this case. It involves only the application of a Kansas lawyer to be admitted to practice in Missouri without taking the Missouri Bar Examination. The propriety of granting or denying such an application is a matter of local concern and rests in the sound discretion of the Missouri Supreme Court. Petitioner apparently is trying to bring his case within the recent decisions of this Court in **Schware v. Board of Bar Examiners**, 353 U. S. 232 (1957), and **Konigsberg v. State Bar of California**, 353 U. S. 252 (1957). Those cases are not comparable with this one. **Schware** and **Konigsberg** involved the problem of the reconciliation of the federally protected rights of freedom of association and speech guaranteed by the First Amendment with the right of a state to determine the qualifications of the members of its Bar. No such problem is involved here. This case does not even involve the question whether a state can preclude an applicant from becoming a member of the State Bar at all. This case simply involves the right of a state to deny a person permission to become a member of a bar without taking a bar examination.

Petitioner apparently is claiming that he either has a constitutional right to be admitted to practice in Missouri without taking the Bar Examination or else he has a constitutional right to take the Missouri Bar Examination without establishing residence in this state. Neither claim is well founded. This Court has never held that a lawyer has a right to be admitted to practice law in a state without taking the Bar Examination nor has it ever held that under any circumstances a state must waive its residence requirement before allowing an applicant to take a State Bar Examination.

The Missouri rules on the admission of attorneys to practice law in the state provide an applicant seeking admission by reciprocity with an adequate remedy in the event his application is denied. The applicant may then apply for permisison to take the Bar Examination. But such permission cannot be granted where the applicant is not a Missouri resident. Here, petitioner's application for permission to take the Bar Examination showed on its face that petitioner was not a resident of Missouri and therefore his application was denied (Petition, pp. A8-A9). Thus, instead of petitioning this Court for a writ of certiorari after he was denied admission to the Missouri Bar by reciprocity, petitioner's proper remedy was to establish residence in this state and apply for permission to take the Bar Examination. Had this been done, petitioner could have demanded a hearing at which time the Board could have received such information as bore upon his qualifications. (See Missouri Supreme Court Rule 8.07.) Petitioner, therefore, cannot claim that the Missouri procedure denies him a right to a hearing since he has that right should he exhaust his state remedies by making proper application to take the Missouri Bar Examination.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

COBURN, CROFT & COOK,

.....

RICHMOND C. COBURN,
411 North Seventh Street,
St. Louis 1, Missouri,
MAin 1-9092,
Counsel for Respondent.

APPENDIX.

1. Section 1257 (3), 28 U. S. C.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

2. Supreme Court Rule 1.19, Vernon's Annotated Missouri Statutes.

Motions for Rehearing. Motions for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. They may be accompanied by suggestions in support containing citation of authorities. Such motion must be filed within fifteen days after the opinion of the court shall be filed, and the motion and suggestions must be served on the adverse party or his attorney within said time. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court.

The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by

its opinion. Mere re-argument of issues determined by the opinion will be disregarded.

If desired, suggestions in opposition to a motion for rehearing may be filed within ten days after the expiration of the time for filing of such motion, and a copy of such suggestions shall be served on the adverse party or his attorney within said time.

3. **Supreme Court Rule 8.05, Vernon's Annotated Missouri Statutes, February, 1959, Cumulative Pamphlet. Qualifications.**

Every applicant for examination for admission to the Bar in this State must be of good moral character, a citizen of the United States, twenty-one (21) years of age, and for at least three months prior to the date of filing their application, must continuously have been bona fide resident of this State.

4. **Supreme Court Rule 8.07, Vernon's Annotated Missouri Statutes, February, 1959, Cumulative Pamphlet. Approval of Applications.**

No applicant for registration as a law student and no applicant to take the bar examination shall be registered or examined until his respective application has been considered and approved by the Board of Law Examiners. Prior to granting such approval for registration as a law student and prior to granting approval to take the bar examination, it shall be the duty of the Board of Law Examiners in each instance to investigate the moral character of the applicants, and in so doing it may call upon the General Chairman of Bar Committees and the Advisory Committee established by Rule 5.13 and Rule 5.14 of this Court and the Bar Committee of the Circuit where the applicant resides to make such investigation

and report its findings to the Board, and it may make such further investigations as may be necessary fully to inform itself concerning the moral fitness of the applicant. The Board may require applicants to submit fingerprints. In no event will permission be granted to register as a law student or to take the bar examination until the investigation as to moral character has been completed.

In every such investigation the Board may obtain such information as bears upon the character, fitness and general qualifications of the candidate and take and hear testimony, administer oaths and affirmations and compel, by subpoena, at the request of the applicant or of the Board, the attendance of witnesses and the production of books, papers and documents. Any member of the Board may administer such oaths and affirmations. The practice of law is a privilege. The burden of establishing his eligibility shall rest on the applicant.

5. **Supreme Court Rule 8.09, Vernon's Annotated Missouri Statutes.**

In the discretion of the Court any attorney admitted to practice in the highest court of another state, in which the standard of admission is substantially equivalent to the standard of this state, who shall have engaged in the practice of law for five years in such state, or who shall have taught as a full-time instructor for five years in any law school or law schools fully approved by the Council on Legal Education and Admission to the Bar of the American Bar Association and who has not discontinued such practice or teaching for such length of time prior to making of application as to prevent the applicant from being well versed in the current state of the law, may be admitted by the court as an attorney without ex-

amination. Such attorney shall make written application to the court on forms to be furnished by the clerk (and furnish affidavits of good moral character by two members of the Bar of this state of at least five years' standing at the Bar, and a certificate respecting his practice signed by a judge of a court of general jurisdiction of the state in which he has practiced), and pay to the clerk a filing fee of One Hundred Dollars ($100.00), and make satisfactory proof that he is such attorney, a citizen of the United States, a resident of the State of Missouri, or intends presently to become such resident, at least twenty-six years of age and of good moral character. An applicant shall engage the services of the National Conference of Bar Examiners, Equitable Building, Denver, Colorado to make a report to the clerk of this court on his or her character, which report, together with application and files, the clerk will forward to the Board of Bar Examiners for consideration and recommendation to this court. The fee of One Hundred Dollars ($100.00) paid by the applicant shall not be subject to withdrawal by the applicant in the event he should decide to withdraw his application, or his application be denied. Admission, without examination, is not a matter of right but in every case will be decided on the basis of the public interest considering the character, education, extent and continuity of practice and the ability of the applicant.